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Reasons for decision

Canadian Union of Postal Workers,

applicant,

and

TNT Express (Canada) Ltd.,

employer.

Board File: 29013-C
Neutral Citation: 2013 CIRB **670**
January 18, 2013

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Norman Rivard and Robert Monette, Members.

Counsel of Record

Ms. Barbara J. Nicholls, for Canadian Union of Postal Workers;

Mr. George Vassos, for TNT Express (Canada) Ltd.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I–Nature of the Application

[1] On October 14, 2011, the Canadian Union of Postal Workers (CUPW) filed a certification application for an Ottawa-based bargaining unit at TNT Express (Canada) Ltd. (TNT).

[2] In its October 25, 2011 response, TNT contested this Board's jurisdiction. TNT argued that it was a freight forwarder and that the principles from the Supreme Court of Canada's (SCC) decision in *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, 2009 SCC 53 (*Fastfrate*) found direct application.

[3] CUPW has argued that TNT fell within federal jurisdiction, in part due to its trips between Ontario and Quebec.

[4] During this process, CUPW also filed an unfair labour practice (ULP) complaint regarding TNT's termination of an employee (Board file 29539-C).

[5] After requesting additional information from the parties regarding the relevant constitutional facts, the Board has satisfied itself that it does not have jurisdiction over TNT's activities.

[6] For the reasons which follow, the Board must dismiss CUPW's certification application, solely on jurisdictional grounds. The Board will provide a separate decision to the parties regarding the ULP complaint.

II–Process

[7] The Board is aware of the significant costs to parties arising from oral hearings. Once initial pleadings have been reviewed, and before deciding whether to exercise its discretion under section 16.1 of the *Code* not to hold an oral hearing, the Board may ask the parties for further particulars.

[8] It may do so in various ways, such as by asking questions in writing or by requesting further information during a Case Management Conference (CMC).

[9] The Board may also, pursuant to section 16(*k*) of the *Code*, ask one of its Industrial Relations Officers (IRO) to meet with the parties and prepare an Investigation Report containing further background information. The parties provide the IRO with the additional information for the Report. They also receive the opportunity to comment on the accuracy of the information the IRO has summarized in the Report before the Board continues with its process.

[10] In the instant case, the Board utilized a couple of these processes. The information gathered has satisfied the Board that it does not need to hold an oral hearing.

[11] In *TNT Express (Canada) Ltd.*, 2012 CIRB 629 (*TNT 629*), the Board dealt with certain preliminary matters involving an intervention request and TNT's objection about CUPW's membership evidence.

[12] While TNT and CUPW had originally suggested the only issue for the Board to determine concerned whether TNT was a "postal service", as that term had been analyzed in *TurnAround Couriers Inc.*, 2010 CIRB 544 (*TurnAround 544*), the Board in *TNT 629* noted that it had an overriding obligation to satisfy itself whether it had jurisdiction:

> [33] The parties do not limit the scope of any constitutional issue before the Board. Whether CUPW raised the issue of the proper characterization of TNT Canada's undertaking or not, the Board must still satisfy itself that it has jurisdiction over the application.
>
> [34] The same principle applies when the parties purport to consent to the Board's jurisdiction. If the Board is not certain whether the *Code* applies, the parties will be called upon to provide appropriate facts and legal submissions (see, for example, *Allcap Baggage Services Inc.* (1990), 79 di 181; and 7 CLRBR (2d) 274 (CLRB no. 778), at pages 184–185; and 276–277).
>
> [35] Notwithstanding the Federal Court of Appeal's recent decision which overturned *TurnAround 544*, the Board still requires the parties' submissions on whether TNT Canada is a freight forwarder within the meaning of *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, *supra*, and/or whether it is part of an overall federal transportation undertaking that would make it subject to the *Code*.
>
> [36] To use TNT Canada's phraseology from its November 28, 2011 letter, the Board is of the view that "whether TNT Canada's business is inter-provincial in nature" is an issue the Board must determine before proceeding further with this application. The Board will forthwith set a timetable for the parties representations on this issue.

[13] In its confirmation letter dated February 24, 2012, the Board asked the parties to provide submissions on the following two questions:

> Further to *TNT Express (Canada) Ltd.*, 2012 CIRB 629, would the parties please provide their submissions on the following:
>
> a) Whether TNT Canada is a freight forwarder within the meaning of the *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, 2009 SCC 53? and/or
>
> b) whether TNT Canada is a part of an overall federal transportation undertaking that would make it subject to the *Code*?

[14] After reviewing the parties' submissions in response to the February 24, 2012 letter, the Board held a CMC with the parties on July 3, 2012. This resulted in the Board setting tentative hearing dates for February 19–21, 2013.

[15] The Board explained to the parties during the CMC that it felt it still required certain particulars. In *TNT Express (Canada) Ltd.*, 2012 CIRB LD 2828 (LD 2828), the Board confirmed the information it required:

> As mentioned at the CMC, one key issue separating the parties involves whether TNT Express (Canada) Ltd. (TNT) is a freight forwarder as opposed to an integral part of a larger federal undertaking. Currently, the Board does not have any particulars about which entity or entities performs the interprovincial and/or international transportation for TNT. The Board also requires the parties' views on whether these facts, once submitted, have an impact on the constitutional determination.

[16] After reviewing the parties' subsequent submissions, the last of which arrived on September 17, 2012, the Board was able to conclude that it did not have jurisdiction over TNT's activities.

III–Facts

[17] TNT, which has its head office in Mississauga, Ontario, operates out of five locations in Canada: Vancouver, Calgary, Mississauga, Ottawa and Montréal. It also uses subcontractors to do its work in Winnipeg, Edmonton and London. It is a subsidiary of an organization providing worldwide delivery and mail services. For ease of reference, we will describe the global TNT companies as "TNT Global", to distinguish them from the respondent TNT.

[18] TNT described itself as a freight forwarder in Canada, an undertaking which involves consolidation, deconsolidation and transport of freight using common carriers. These common carriers could operate interprovincially, intraprovincially or internationally.

[19] TNT's Employee Handbook for Canadian Employees (Handbook), which was attached to its October 25, 2011 submission, described the history and scope of TNT Global's worldwide operations. Besides describing various corporate mergers over time, the Handbook highlighted the fact that TNT Global's Express division "flies 47 aircraft" and "is among the four biggest international delivery operators and the number one in Europe":

Who is TNT? Our history

Since 1983, TNT Express has provided companies in the [*sic*] North America with reliable access to the world's most extensive express network. Through our international gateways in Toronto, Vancouver, New York, Miami and Los Angeles, we can ensure on-time delivery to virtually anywhere around the world.

TNT was originally founded in Sydney, Australia in 1946. In 1961 the company became a public company in Australia and expanded into Europe in the 1970's. TNT acquired Skypak (International Courier) and Ipec (European Road Freight) in 1983 and launched its wholly owned European Air Network in 1987.

The International Air and Road Divisions and Networks of TNT were integrated in 1991 to form the company, TNT Express Worldwide. This was closely followed by the Joint Venture between TNT and the five national post offices of the Netherlands, France, Germany, Sweden and Canada to form GD Express Worldwide (Brand name: TNT Express Worldwide) in the same year.

In the early 1990's GD Express Worldwide further expanded with key milestones being the introduction of a daily transatlantic freighter service, the development of an Asian Air Network and the delivery contract for all Federal Express shipments in Europe.

TNT's history is also based upon the success of major domestic transportation and logistics organizations worldwide, but primarily in Germany, the United Kingdom, Italy, the Benelux and Australia.

In December 1996, KPN, the Dutch national post and telecommunications organization, acquired all TNT trading entities throughout the world. The intention was to integrate the postal company PTT Post with the domestic organizations of TNT Ltd. and GD Express Worldwide. **The integrated company is now known as TNT N.V. (previously TNT Post Group) with Royal TPG Post and TNT as its two brands.** In June 1998, TNT Post Group (now TNT N.V.) became the first mail company to be listed on the New York Stock Exchange. TNT N.V. is also traded on the Amsterdam stock exchange.

Today, TNT N.V. employs over 128,000 people in 60 countries and serves over 200 countries. TNT's Express division is among the four biggest international delivery operators and the number one in Europe. Worldwide, it moves an average of 4.4 million parcels, documents and pieces of freight a week to more than 200 countries. **With 2007 revenues over €6.5 billion, TNT's Express division continually expands its air and road network in Europe, Asia, Australia, South-America and the Middle-East, connecting international routes to fast-growing domestic road networks. The division employs well over 50,000 people, runs 26,760 trucks and flies 47 aircraft. It operates 2,331 depots and sorting centers.**

(emphasis added)

[20] TNT provided further information in its August 9, 2012 submission regarding which entities in Canada provided it with any interprovincial or international transportation services.

[21] At page 8 of its submission, it described the primary carriers it uses for interprovincial transport:

> In TNT's case, the company contracts with a number of carriers to transport its customers' freight both interprovincially within Canada and internationally outside of Canada. In terms of the carriers utilized within Canada, the following are the primary carriers used by TNT's regular network:
>
> - Purolator Courier
> - Westjet
> - Ceva Freight Canada Ltd.
> - Con-way Freight Canada
> - Cargo Jet
> - Dinamex (Ottawa)

[22] For international delivery, TNT described the transportation services it purchases:

> On the international delivery front, TNT contracts with the following carriers in order to move its customers' freight from Canada to international locations:
>
> - UPS
> - Air Canada
> - Jet Airways
> - KLM
> - British Airways
> - Cathay Pacific

[23] In contrast seemingly to the situation for a United Parcel Service (UPS) or Federal Express Canada Ltd. (FedEx), TNT in its September 17, 2012 letter advised the Board that no TNT Global related entity transported goods into or out of Canada:

> **As for the international transport of goods by TNT on behalf of its customers, TNT has provided, in its August 9 submissions, a full list of all third party carriers that it uses for international transportation from Canada to destinations outside this jurisdiction. TNT wishes to make it quite clear that it does not have any contract with nor has it utilized any TNT branded aircraft in the international transportation of its goods.** As has already been stated in earlier submissions to the Board, a contractual relationship with a third party carrier that crosses an interprovincial or international boundary is not sufficient to bring the contracting entity within the scope of Federal jurisdiction.
>
> Certainly to this point, TNT understood that the Board believed it had sufficient constitutional facts, with the exception of details about third party carriers.

> **While some of the freight handled by TNT is, for international deliveries, shipped to other TNT Global distribution hubs in other countries, the delivery of that freight within that destination jurisdiction may be completed by vehicles owned and operated by another TNT Global subsidiary or may be dealt with by a third party subcontractor for final delivery to the client destination.** The use of the facility of another TNT Global subsidiary in another jurisdiction is unrelated to and does not affect the issue of whether or not TNT actually transports goods across interprovincial or international borders and is therefore not determinative of the constitutional question in this case.

(emphasis added)

[24] TNT further described TNT Global's lack of involvement in any of its international transportation at page 5 of its September 17, 2012 submission:

> **As TNT outlined in its August 9, 2012 submissions, the actual transport of goods across the Canadian international border is carried out for TNT by a number of third party air carriers. None of these air carriers are subsidiaries of or some how related to TNT and are all third party commercial carriers.** In the case where TNT has contracted with these third party carriers to carry out that international transportation of goods across Canadian borders, even where the ultimate destination of that transportation may be another TNT Global distribution hub, that activity still falls within the type of a freight forwarding situation contemplated by the Supreme Court of Canada in *Fastfrate*.

(emphasis added)

[25] TNT's September 11, 2012 comments had no doubt responded to CUPW's suggestion, as set out in paragraphs 32–34 of its September 10, 2012 submission, that TNT was a local arm of a broader global undertaking.

[26] CUPW raised a second issue arising from TNT's trips between Ontario and Quebec. CUPW suggested these trips were sufficient to bring TNT within federal jurisdiction. TNT disagreed and argued they fell outside the "regular and continuous" analysis used in these types of cases.

[27] TNT acknowledged that its Ottawa depot, "on a very limited and *ad hoc* basis", will occasionally deliver and pickup consignments in Quebec. At page 4 in its September 17, 2012 submission, TNT provided a Table which summarized its interprovincial trips:

Year	Pickup	Delivery
2010	8	62
2011	10	68
2012	0	24

[28] CUPW alleged that Quebec pickups occurred more frequently. CUPW indicated an unnamed former employee had suggested she was personally dispatched on Quebec deliveries 3 to 4 times per week. CUPW suggested these trips could amount to 144 interprovincial trips a year for just this employee alone:

> 20. CUPW has obtained evidence from a former TNT employee that establishes pick-ups in Quebec by TNT drivers occur on a regular basis.
>
> 21. The evidence of this former employee is that she was personally dispatched to make pick-ups in Quebec 3 to 4 times per week.
>
> 22. On the evidence of this one driver TNT is moving or transporting goods across the Quebec border into Ontario at least 144 times per year (assuming a 48 week work year and only 3 deliveries per week).
>
> 23. TNT utilizes numerous drivers and, as noted above, goods are being transported in both directions.
>
> 24. Based upon the above it is the CUPW's position that transportation across the Ontario/Quebec border is not exceptional or irregular but forms part of TNT's habitual transportation routine and service offering to its customers.

[29] CUPW provided no further information from other current TNT employees.TNT speculated on the identity of the unnamed employee and suggested her evidence was out of date.

IV–Issues

[30] The facts raise three interrelated issues:

1–TNT's regular and habitual activities: the functional test

2–Are TNT's trips from Ottawa to Quebec sufficiently regular or continuous enough to bring it within federal jurisdiction?; and

3–Could TNT be part of, or vital/essential to, a federal undertaking?

V–Analysis and Decision

Applicable Constitutional Law Principles

[31] The analytical principles in this case, albeit arising in a different factual context, do not differ substantially from those considered in *Schnitzer Steel BC, Inc.*, 2012 CIRB 640 (*Schnitzer 640*). In that case, the parties disputed the nature of the employer's undertaking. Schnitzer Steel BC Inc. alleged it operated a scrap metal business. In contrast, the applicant trade union alleged that Schnitzer operated an interprovincial transportation undertaking, since it carried third parties' goods across provincial boundaries.

[32] In the instant case, TNT described itself as a freight forwarder, which the SCC *Fastfrate*, *supra*, has now clearly held is a provincially regulated undertaking:

> [61] **In the transportation context, it is not possible for an undertaking to operate an interprovincial transportation service where it does not itself perform the interprovincial carriage. A business can, of course, act as an intermediary between interprovincial carriers and consumers who want to access those carriers at a reduced price. This does not mean that such a business becomes the operator and provider of the interprovincial carriage, however.** The fact that customers may be unaware that the intermediary company is not in fact performing the interprovincial carriage is, in my view, irrelevant to the constitutional inquiry. Section 92(10)(*a*) is concerned with the nature of undertakings, not how they are subjectively understood by consumers. As this Court emphasized in *Northern Telecom*, at p. 132, "[t]he question whether an undertaking, service or business is a federal one depends on the nature of its operation."

(emphasis added)

[33] It is apparent from *Fastfrate*, *supra*, that a freight forwarder remains provincially regulated if it does not transport goods itself interprovincially or internationally on a regular and continuous basis.

[34] TNT maintained it was a freight forwarder, while CUPW alleged it was really an interprovincial undertaking due to its interprovincial trips and/or its relationship with TNT Global.

[35] The SCC has recently summarized several key constitutional law principles for these jurisdiction cases. For example, in *Fastfrate*, *supra*, at paragraphs 27–28, the SCC noted that provincial competence over labour relations is the rule; federal competence is the exception:

> [27] **The basic rule in the division of powers over labour relations is that the provinces have jurisdiction over industries that fall within provincial legislative authority and the federal government has jurisdiction over those that fall within federal legislative authority**: see *Labour and Employment Law: Cases, Materials, and Commentary* (7th ed. 2004), at p. 85. **However, as the jurisprudence makes clear, federal jurisdiction has been interpreted narrowly in this context**. In *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, the Judicial Committee of the Privy Council held that the s. 92(13) provincial head of power over "Property and Civil Rights" in the provinces includes labour relations. It is only where a work or undertaking qualifies as federal that provincial jurisdiction is ousted.
>
> [28] In *Northern Telecom Ltd.* v. *Communications Workers of Canada*, [1980] 1 S.C.R. 115, Dickson J. (as he then was) summarized the principles that govern federal-provincial jurisdiction over labour relations, at p. 132:
>
> > (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
> >
> > (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
> >
> > ...
> >
> > (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
>
> **Under s. 92 of the *Constitution Act, 1867*, therefore, provincial jurisdiction is the norm**. Federal jurisdiction extends only to those classes of subjects expressly excepted from the provincial heads of power and those enterprises deemed integral to such federal works and undertakings. As I will discuss, s. 92(10)(*a*), itself a limited carve-out, provides for such a federal exception. The question in this case is whether the nature of the operations of Fastfrate are subject to provincial or federal jurisdiction.

(emphasis added)

[36] In *NIL/TU,O Child and Family Service Society* v. B.C. *Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696 (*NIL/TU,O*), the SCC at paragraphs 1–4 summarized the applicable analysis when deciding whether an employer fell into federal or provincial jurisdiction:

> [1] ABELLA J. - NIL/TU,O Child and Family Services Society ("NIL/TU,O") provides child welfare services to certain First Nations children and families in British Columbia. It has a unique institutional structure, combining provincial accountability, federal funding, and a measure of operational independence.
>
> [2] None of the parties dispute that child welfare is a matter within provincial legislative competence under the *Constitution Act, 1867*. NIL/TU,O does not challenge the constitutional validity of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, as it applies to Aboriginal people. Nor is the issue whether the federal government can enact labour relations legislation dealing with "Indians". It clearly can. The issue in this appeal is whether NIL/TU,O's labour relations nonetheless fall within federal jurisdiction over Indians under s. 91(24) because its services are designed for First Nations children and families.
>
> [3] **For the last 85 years, this Court has consistently endorsed and applied a distinct legal test for determining the jurisdiction of labour relations on federalism grounds. This legal framework, set out most comprehensively in *Northern Telecom Ltd.* v. *Communications Workers of Canada*, [1980] 1 S.C.R. 115 and *Four B Manufacturing Ltd.* v. *United Garment Workers of America*, [1980] 1 S.C.R. 1031, and applied most recently in *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, is used regardless of the specific head of federal power engaged in a particular case. It calls for an inquiry into the nature, habitual activities and daily operations of the entity in question to determine whether it constitutes a federal undertaking. This inquiry is known as the "functional test". Only if this test is inconclusive as to whether a particular undertaking is "federal", does the court go on to consider whether provincial regulation of that entity's labour relations would impair the "core" of the federal head of power.**
>
> [4] The "core" of whatever federal head of power happens to be at issue in a particular labour relations case has never been used by this Court to determine whether an entity is a "federal undertaking" for the purposes of triggering the jurisdiction of the *Canada Labour Code*, R.S.C. 1985, c. L-2. Since in my view the functional test conclusively establishes that NIL/TU,O is a provincial undertaking, I do not see this case as being the first to require an examination of the "core" of s. 91(24).

(emphasis added)

[37] In *Schnitzer 640*, after considering the principles summarized by the SCC, the Board described its task at paragraphs 54–58:

> [54] Accordingly, the Board needs to examine first the "functional test" to see if it can determine Schnitzer's habitual activities and daily operations. Is Schnitzer properly characterized as an interprovincial transportation undertaking, as the IUOE suggests, or is it a provincially-regulated scrap metal recycler?
>
> [55] The Board will only consider the second "core impairment" test, if the functional test proves inconclusive.

> [56] In order to consider the functional test, the Board examined two related questions it has applied for transportation undertaking situations: i) is Schnitzer carrying out a transportation undertaking?; and ii) are its extra-provincial trips sufficiently "regular and continuous" in order to bring it within federal jurisdiction.
>
> [57] The Board used a similar analytical focus in *Pioneer Truck Lines Ltd.*, 1999 CIRB 31 (*Pioneer Truck*), at paragraph 17:
>
> > [17] Before turning to the "regular and continuous" test, the Board must first be satisfied that the operation in question is in fact a transportation operation. The employer, in this case, has argued that the core activity of Pioneer Truck is "more akin to construction than to interprovincial trucking."
>
> [58] For the following reasons, the Board finds that the normal and habitual activities of Schnitzer are that of a scrap metal recycler rather than as an interprovincial transportation undertaking.

[38] The Board in this case needs to determine whether TNT truly is a freight forwarder, which is a type of intra-provincial transportation undertaking, or whether its relationship with TNT Global or its Quebec/Ontario trips makes it an interprovincial transportation undertaking.

1–TNT's regular and habitual activities: the functional test

[39] In *Fastfrate*, *supra*, a majority of the SCC decided that an undertaking which arranged the movement of customers' goods interprovincially using exclusively third party common carriers remained within provincial jurisdiction. The business in that case, like with TNT, conducted regular local pickups and deliveries of the goods in question.

[40] A majority of the SCC in *Fastfrate*, *supra*, specifically rejected the analysis this Board's predecessor, the Canada Labour Relations Board (CLRB), had used in *DHL* (1994), 96 di 106 (*DHL*) for an undertaking not dissimilar to that of TNT:

> [59] With respect, I am not persuaded by the reasoning in *DHL*. In finding DHL Ltd. to be subject to federal regulation, the CLRB applied the "regular and continuous" test in a novel, and in my view, unhelpful way. The test had formerly been used by courts to decide whether an undertaking was involved in "regular and continuous" *physical transportation* across boundaries: see *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279* (1983), 4 D.L.R. (4th) 452 (Ont. C.A.). The CLRB instead considered whether a "dominant [interprovincial] purpose", defined in terms of contractual services offered to clients, was "regular and continuous". The focus shifted from the nature of the operations of the undertaking to the nature of the contractual service it provides.

[41] TNT's operations initially fit with the SCC's description in *Fastfrate*, *supra*, of a freight forwarding business:

> [4] The market niche of freight forwarding companies is the consolidation and deconsolidation of freight. This is their economic *raison d'être*. The consolidation and deconsolidation of freight allows customers to benefit from an economy of scale when accessing third-party carriers. As the Alberta Labour Relations Board ("ALRB") noted, "[b]y pooling the small shipments of many customers into full truckload shipments, Fastfrate can realize economies of scale that the individual customer cannot easily realize, and so can pass the savings to the customer" ((2005), 114 C.L.R.B.R. (2d) 1, at para. 8). Without this consolidation service, customers sending less-than-truckload and less-than-carload shipments would face substantially higher costs.

[42] TNT, like other freight forwarders, performs consolidation, deconsolidation and local pickup/delivery services from its various Canadian locations.

[43] A majority of the SCC in *Fastfrate*, *supra*, determined that this type of business remained intra-provincial, even if it offered a national footprint as had occurred in *DHL*, *supra*:

> [3] I am of the view that an undertaking that performs consolidation and deconsolidation and local pickup and delivery services does not become an interprovincial undertaking simply because it has an integrated national corporate structure and contracts with third-party interprovincial carriers. Fastfrate does not perform any interprovincial carriage itself. Absent this, I see no compelling reason to depart from the general rule that works and undertakings are regulated by the provinces. Accordingly, the labour relations of the employees of Calgary Fastfrate are subject to provincial jurisdiction. I would therefore allow the appeal.
>
> ...
>
> [48] To this end, I am in agreement with and would uphold the line of cases holding that freight forwarders that are not themselves engaged in the interprovincial transport of freight and that simply contract with interprovincial carriers remain subject to provincial jurisdiction.

[44] Even if TNT initially appears to be a freight forwarder, the Board must continue its analysis, since this case differs in certain respects from *Fastfrate*, *supra*.

[45] In *Fastfrate*, *supra*, there was no suggestion the employer carried out any interprovincial trips. Neither was there any suggestion that Fastfrate was a part of, or vital or essential to, any related companies which might have been carrying out interprovincial transportation on its behalf.

[46] Those questions have to be examined in the current case.

2–Are TNT's trips from Ottawa to Quebec sufficiently regular or continuous to bring it within federal jurisdiction?

[47] The Board has found that TNT has many of the hallmarks of a freight forwarder as described by the SCC in *Fastfrate*, *supra*.

[48] The next issue that the Board has to consider is whether the trips between TNT's Ottawa office and Quebec make it subject to federal jurisdiction. The proximity of Quebec and Ontario in the Ottawa region has lead to similar constitutional jurisdictional disputes in the past.

[49] For example, in *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al.* (1983), 44 O.R. (2d) 560 (*OC Transpo*), the Ontario Court of Appeal found that Ottawa's municipal bus service, with 450 regularly scheduled daily runs across the Ontario-Quebec border, fell within federal jurisdiction.

[50] Conversely, the CLRB found in *Ottawa Taxi Owners and Brokers Association* (1984), 56 di 73 (CLRB no. 464) (*Blue Line*) that taxi trips across that same border, some on a daily basis, did not bring the employer within federal jurisdiction.

[51] In the instant case, as cited earlier, TNT provided a table it says represents its cross-border trips for almost the last three years. CUPW contested the accuracy of that table and suggested an unnamed former employee made approximately 3–4 trips weekly, for an estimated 144 interprovincial trips annually.

[52] CUPW implied other employees might do the same, but provided no specific information on this point.

[53] The Board decided that it could come to a conclusion about jurisdiction based even on CUPW's evidence as presented.

[54] The cases are clear that the Board must adopt a qualitative, rather than quantitative, approach to this question. In other words, the Board's conclusion is not based on whether it

accepts TNT's suggested annual number of 68 trips (2011) or CUPW's suggested number of at least 144 annual trips.

[55] Rather, the Board needs to decide whether TNT's interprovincial trips are regular and continuous, in contrast to a situation where such trips are only carried out on a casual, occasional, irregular or exceptional basis.

[56] In order to do this, the Board considers whether such trips constitute the normal and habitual activities of TNT. The percentage of these interprovincial trips relative to TNT's overall operations, which is minute, is not determinative of jurisdiction.

[57] The Board, in *The Gray Line of Victoria Ltd.* (1989), 77 di 169 (CLRB no. 741), discussed some of the leading cases that had developed the "regular and continuous" test. In that regard, it cited *Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, [1960] O.R. 497 (H.C.J.) (*Tank Truck*), which confirmed that occasional or irregular interprovincial operations do not transform a provincial undertaking into a federal undertaking. In *Tank Truck, supra*, the Court stated:

> I agree with counsel for the respondent that not every undertaking capable of connecting Provinces or capable of extending beyond the limits of a Province does so in fact. The words connecting and extending in s. 92(10)(a) must be given some significance. For example a trucking company or a taxicab company taking goods or passengers occasionally and at irregular intervals from one Province to another could hardly be said to be an undertaking falling within s. 92(10)(a). As appears from the *Winner* case and the *Underwater Gas Developers* case undertaking involves activity and I think that to connect or extend, that activity must be continuous and regular ...

(QL, paragraph 31)

[58] In *Tank Truck*, the Court ultimately found that the hauling of goods by truck into Quebec extended well into that province and was carried out with reasonable regularity, such that its operations fell under federal jurisdiction. By way of contrast, in *The Gray Line of Victoria Ltd., supra*, the Board found that Gray Line was not in fact a federal work or undertaking because the unscheduled and sporadic interprovincial trips actually taken, were not sufficient to bring the operation under federal jurisdiction. The Board concluded:

> Taking the overall view of Gray Line's operations, we are satisfied that its normal and habitual activities are intra-provincial and that its extra-provincial activities are no more than intermittent and casual in nature. We therefore decline jurisdiction.
>
> (page 179)

[59] The Board is satisfied that TNT's interprovincial trips, which CUPW did not contest were carried out on an *ad hoc* basis, are properly characterized as being occasional and casual. While not determinative, there was no evidence that such trips were part of a regular schedule for TNT drivers. Indeed, TNT alleged they were clearly unscheduled and occurred at the discretion of the Depot Manager.

[60] It was not contested that TNT usually used a third party contractor to make deliveries to and from the Hull-Gatineau area. This may explain the infrequent trips into an obvious catchment area for TNT's Ottawa operations. TNT explained that its interprovincial trips occurred generally when third party contractors were not available, especially when time was of the essence.

[61] In the Board's view, interprovincial collection and delivery of goods does not constitute TNT's normal and habitual activities. Rather, any such trips are more properly characterized as casual or occasional.

[62] TNT's normal and habitual activities are that of a freight forwarder which has made the seemingly conscious decision not to engage in interprovincial or international transportation. A majority of the SCC held in *Eastfrate*, *supra*, that a business is entitled to organize its affairs, taking into account constitutional law principles:

> [47] In the present case, there is an existing body of freight-forwarding jurisprudence that has been cited approvingly by our Court. Where no convincing reason has been shown as to why we should depart from this jurisprudence, parties should be able to rely on it and organize their affairs accordingly.

3–Could TNT be part of, or vital or essential to, a federal undertaking?

[63] As described in the Handbook, TNT Global has worldwide operations. The Board could not determine from the parties' initial pleadings TNT Global's activities for Canada. It was unclear whether any transportation link existed between TNT's Ottawa operations and TNT Global's worldwide business.

[64] For example, if TNT Global regularly flew goods in and out of Ottawa (or elsewhere in Canada), the question might arise whether any subsequent local delivery by TNT was vital or essential to this interprovincial or international undertaking. Similarly, a question might arise whether TNT could be considered as an indivisible part of TNT Global's international undertaking.

[65] The Handbook suggested that TNT Global had significant international transportation operations on other continents. But there was no indication in the initial pleadings of anything comparable in North America, especially in Canada.

[66] TNT advised the Board, as described earlier, that no TNT Global related business transported items across provincial or international borders in order to allow TNT to complete deliveries in Canada.

[67] In the Board's view, an oral hearing on this point is not required. CUPW, while disagreeing with the facts TNT alleged, has not put forward any contradictory facts about TNT's description of its operations and operational relationship with TNT Global. Were the Board faced with contradictory evidence, then an oral hearing might have been required.

[68] In this case, in the absence of any concrete allegations suggesting that TNT Global related companies regularly transport Canadian items either interprovincially or internationally for TNT, TNT cannot be considered as vital or essential to that possible federal undertaking. The facts similarly suggest that TNT, while clearly a related company, does not constitute with TNT Global a single indivisible undertaking which transports goods to and from Canada.

VI–Conclusion

[69] The Board has been satisfied that TNT is a freight forwarder, as described in *Fastfrate*, *supra*. A majority of the SCC specifically disagreed with the CLRB's previous analysis of such undertakings in *DHL*, *supra*. But for the decision in *Fastfrate*, *supra*, the Board might well have agreed with some of CUPW's legal arguments in this case.

[70] Unlike in *Fastfrate*, *supra*, TNT does perform some interprovincial trips. However, regardless of the precise number of these trips, the Board has not been convinced that those trips are a regular and continuous aspect of TNT's undertaking. They are not sufficient to transform TNT from a freight forwarder, or intra-provincial transportation undertaking, into an interprovincial transportation undertaking.

[71] Similarly, the Board has not been persuaded that TNT is either part of, or vital or essential to, a TNT Global interprovincial undertaking. TNT Global does not transport goods into or out of Canada for TNT. This fact distinguishes TNT from some courier companies which operate in and out of Canada.

[72] The Board does not have jurisdiction over TNT and therefore must dismiss CUPW's certification application.

[73] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

Norman Rivard
Member

Robert Monette
Member